Velan Valve Corporation *and* Local Lodge 2704, District Lodge 109, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 1–CA–31317

April 19, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On November 28, 1994, Administrative Law Judge Steven M. Charno issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to arbitrate a September 8, 1993 subcontracting grievance. The General Counsel excepts contending that the Respondent's refusal to arbitrate this grievance, as well as certain earlier grievances, constitutes an unlawful policy of refusing to arbitrate any grievance it chooses. For the following reasons, as well as those stated by the judge, we reject the General Counsel's arguments—to which our dissenting colleague partially subscribes—and find that the Respondent did not violate the Act as alleged.[1]

The relevant facts are not in dispute. The Union represents a unit of the Respondent's employees under the terms of a 1992–1995 collective-bargaining agreement. This agreement includes a three-step grievance procedure followed by binding arbitration. Article 14.5 of the 1992–1995 agreement provides that ''[g]rievances not presented within five (5) working days after the circumstances giving rise to such grievances occurred or should have been known shall not be considered as valid.'' Article 15.1 provides that any grievance not settled under article 14 may be submitted to arbitration at the election of either party.

On August 5, 1993,[2] the Respondent wrote the Union, stating ''be advised that effective immediately we shall subcontract all shop janitorial services.'' The August 5 notice listed all work affected by the Respondent's subcontracting decision. On August 20, subcontracting commenced at the Respondent's jobsite. On August 23, the Respondent informed the Union that a subcontractor was on the job.

On September 8, the Union filed a grievance protesting the subcontract.[3] Thereafter, the parties proceeded through the successive steps of the contractual grievance procedure. At each step, the Respondent denied the September 8 grievance as untimely under article 14.5.[4] The Respondent also argued that the subcontracting grievance lacked merit.

On November 11, the Union notified the Respondent that it wanted to arbitrate the September 8 grievance. It also asked the Respondent to join it in requesting a list of arbitrators from the Federal Mediation & Conciliation Service.

On November 18, the Respondent denied the Union's arbitration request. Specifically, the Respondent wrote the Union stating, in part, that:

> It has always been and continues to be Velan's intent to consider and discuss grievances at all levels of the procedures contained in Articles 14 and 15, with the aim and intent to resolve same. This grievance was no exception.

The Respondent further wrote, however, that arbitration of the subcontracting grievance was unwarranted because it was untimely filed. Specifically, the Respondent stated that: (1) the Union was notified of the subcontracting decision on August 5; (2) the subcontract was let on August 6; (3) subcontractors began working on the jobsite on August 20; and (4) the Union was informed that subcontractors were on the job on August 23. Based on these facts, and the agreement's explicit 5-day grievance-filing requirement, the Respondent wrote the Union that ''[t]he Company refuses to allow an outsider to review an issue which has been unequivocally resolved and settled by the language of the Labor Agreement.''[5] Finally, in its November 18 letter, the Respondent also asserted that the subcontracting grievance lacked merit.

On these facts, the judge initially determined that, notwithstanding its timeliness defense, the Respondent

[1] For the reasons stated by the judge, we reject the General Counsel's claim that the Respondent's refusal to process earlier grievances and its refusal to process the instant one establish a pattern of unlawful conduct. Our dissenting colleague does not dispute this conclusion.

[2] All dates are in 1993 unless noted.

[3] Although not addressed by the General Counsel, it appears that the Union was contending that the subcontracting actually commenced on September 8.

[4] The Respondent further maintained that the grievance was barred under art. 14.6 which provides that individual grievances not processed within contractually prescribed time limits are ''deemed to have been resolved against the party failing to comply.'' Our dissenting colleague argues that art. 14.6 is inapplicable because the September 8 grievance was a ''policy'' rather than ''individual'' grievance which is expressly not covered by art. 14.6. For purposes of our decision we find it unnecessary to determine whether the Respondent was correct, under the contract, in citing art. 14.6 in addition to art. 14.5.

[5] The judge found, and no party disputes, that the ''issue'' to which the Respondent referred was the contractual time limits for grievance filing.

was *contractually* required under *John Wiley & Sons v. Livingston*,[6] and its progeny, to arbitrate the September 8 grievance. The judge further found, however, that the Respondent's failure to comply with this contractual requirement did not automatically violate the Act. Instead, the judge determined that Section 8(a)(5) would be violated only if the Respondent's contractual breach clearly and unequivocally repudiated the contractual arbitration provision. Because the judge found that the Respondent's refusal was limited to a ''narrow class'' of grievances, i.e., only those failing to meet the contract's procedural time limits, he concluded that the Respondent had not been shown to have repudiated the contractual arbitration provisions. We agree.

It is well settled that not every employer refusal to arbitrate violates Section 8(a)(5). *Mid-American Milling Co*., 282 NLRB 926 (1987). Where there is a refusal to arbitrate all grievances,[7] or where the refusal to arbitrate a particular class of grievances amounts to a wholesale repudiation of the contract, a violation will be found. See *Indiana & Michigan Electric Co*., 284 NLRB 53 (1987). Conversely, if the refusal to arbitrate is limited to a single grievance or specifically defined, ''narrow class'' of grievances, Section 8(a)(5) is not violated. *GAF Corp*., 265 NLRB 1361, 1365 (1982); *Mid-American Milling Co*., supra. The relevant inquiry in determining whether an employer's refusal to arbitrate violates the Act is whether the employer, by its refusal, has thereby unilaterally modified terms and conditions of employment during the contract term. *Southwestern Electric*, 274 NLRB 922, 926 (1985).

We agree with the judge that the Respondent's refusal to arbitrate on timeliness grounds was not tantamount to a wholesale repudiation of the contractual arbitration provision. Cf. *Airport Limousine Service*, 231 NLRB 932, 934–935 (1977); *Paramount Potato Chip*, supra. Thus, there is no evidence that, when the Respondent refused to arbitrate the September 8 grievance, it was announcing a broad policy of refusing to arbitrate grievances generally. On the contrary, the Respondent participated at each step in the grievance proceeding over the September 8 grievance. At each step, it reaffirmed its position that the grievance was facially invalid under the procedural time limits of the collective-bargaining agreement. And when refusing to arbitrate this grievance on November 18, it did so on the limited, narrow basis that the grievance was contractually barred on timeliness grounds. Significantly, at the same time as its refusal, the Respondent reassured the Union that it remained committed to processing grievances under article 14, and to article 15, the contractual arbitration provision. In these circumstances, we find that the Respondent's limited refusal was not unlawful. See, e.g., *Central Illinois Public Service Co*., 139 NLRB 1407, 1418 (1962), enfd. 324 F.2d 916 (7th Cir. 1963). We further find that its refusal involves precisely that type of narrow, fact-bound, contractual dispute that more properly should be handled by the parties through the contract-dispute mechanism, and not by recourse to the Board.[8]

Our dissenting colleague argues that the Respondent's refusal was not limited to a ''narrow class'' of grievances because its timeliness defense could be applied to grievances concerning various subject matters. For this reason, citing *3 State Contractors*, 306 NLRB 711 (1992), the dissent contends that the Respondent unlawfully imposed the position that it would ''arbitrate only those grievances that it decided should go to arbitration.'' We disagree. *3 State Contractors* is distinguishable. There, the Board concluded that since the employer refused to arbitrate more than one grievance, based on more than one theory, it effectively arrogated to itself the determination of which grievances should be arbitrated. Here, the Respondent refused to arbitrate one grievance, and that refusal was based on the specific and narrow procedural ground of untimeliness. Further, it is clear that the Respondent's contention regarding untimeliness is one that is based on a reasonable and good-faith interpretation of the contract. At most, one can infer that the Respondent would refuse to arbitrate on any occasion where it has a good-faith and reasonable argument that a grievance is untimely. However, even that position would be a far cry from a wholesale repudiation of the arbitration provision of the contract. Nor would that position permit the Respondent to arrogate to itself the resolution of the timeliness issue. The Union can file a Section 301 suit to require arbitration of the issue of timeliness.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER BROWNING, dissenting.

I would reverse the judge and find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to arbitrate a grievance filed by the Union on September 8, 1993, protesting the Respondent's subcontracting of shop janitorial services. Contrary to the judge and my colleagues, I find that the Respondent has effectively unilaterally modified the grievance-arbitration provisions of the parties' collective-bargaining agreement by reserving to itself alone the determination of which grievances are timely and therefore arbitrable under the contract.

The relevant facts are undisputed. Since 1981, the Union has represented a unit of the Respondent's employees under successive collective-bargaining agree-

[6] 376 U.S. 543, 556–559 (1964).

[7] *Paramount Potato Chip Co*., 252 NLRB 794 (1980).

[8] In this regard, we note that the Union retains the option under Sec. 301 to sue to compel arbitration of a grievance.

ments. Article 14 of the parties' current 3-year contract sets forth a three-step grievance procedure, and provides in article 14.5 that grievances which are ''not presented within five (5) working days after the circumstances giving rise to such grievances occurred or should have been known shall not be considered as valid.'' The arbitration provision of the agreement, article 15, provides that grievances ''not settled in accordance with Article 14'' may be submitted to arbitration at the option of either party, and that, upon submission, the parties promptly shall make a joint request for an arbitration panel.

On August 5, 1993,[1] the Respondent informed the Union in writing that ''effective immediately we shall subcontract all shop janitorial services.'' The first subcontracted janitorial worker was assigned to the Respondent's facility on August 20 and, on August 23, the Respondent informed the Union that subcontracted workers were on the job. On September 8, the Union filed a grievance protesting the subcontracting.[2]

The Respondent denied the grievance at each step of the grievance procedure both on the merits and on the ground that the grievance had not been filed within the 5-day time limit set forth in article 14.5. On November 11, the Union requested arbitration. In a memorandum dated November 18, the Respondent rejected the Union's request for arbitration, stating that the grievance was invalid because the grievance was untimely filed under article 14.5 and therefore had been settled against the Union under article 14.6 of the agreement.[3] Most significantly, the Respondent's November 18 memorandum to the Union also stated that: ''[t]he Company refuses to allow an outsider to review an issue which has been unequivocally resolved and settled by the language of the Labor Agreement.'' The judge found, and no one disputes, that the ''issue'' referred to in this statement is the contract's procedural time limits for the filing of a grievance.

The judge found that the Respondent had a contractual duty to arbitrate the subcontracting grievance because procedural issues, such as timeliness of a grievance, are issues to be determined by an arbitrator and do not relieve a party of its obligation to arbitrate. The judge, however, found that the Respondent's refusal to arbitrate this single grievance did not violate Section 8(a)(5) because it did not evince an unequivocal repudiation of the arbitration provisions of the contract. Instead, the judge found that the Respondent was only refusing to arbitrate a ''narrow class'' of grievances, namely, those which it deemed did not meet the timeliness requirement of the contractual grievance provision.

I disagree. Although the refusal to arbitrate a single grievance or a ''narrow class'' of grievances does not constitute a violation of Section 8(a)(5),[4] the Respondent's refusal to arbitrate the September 8 grievance and its November 18 statement denying the Union's request for arbitration demonstrate that the Respondent is not merely refusing to arbitrate a ''narrow class'' of grievances but rather is refusing to arbitrate any grievance—*concerning any subject*—that in its unilateral judgment has not been filed or processed in a timely manner. The threshold procedural arbitrability issue of whether a grievance is timely applies to a broad range of subject matters and indeed may arise in connection with any grievance. The parties' contract has expressly vested in the arbitrator the determination of the arbitrability of all grievances, and the Supreme Court has clearly held that procedural arbitrability is properly within the arbitrator's domain. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). Whatever the merits of the Respondent's argument as to timeliness of the grievance, it must make that argument to the arbitrator; the Respondent may not limit access to arbitration by reserving for itself the exclusive right to evaluate the timeliness of any particular grievance.

It is reasonable to foresee that there will be instances where the parties have a legitimate dispute about whether a grievance has been timely filed. These situations will arise when the parties disagree about when (in the words of art. 14.5) ''the circumstances giving rise to such grievances occurred or should have been known'' for purposes of computing the 5-day time limit within which the grievance must be presented. In other words, it may not always be clear what should be considered the event which triggers the running of the contractual time limits or when the Union should have been aware of this event. Past practice, oral waiver of contractual time limits, and other similar arguments may also be advanced. Under the Respondent's stated and actual policy, the Union would be deprived of the opportunity to present such close and potentially availing factual issues to an arbitrator for determination, because the Respondent would have refused to arbitrate based on its unilateral judgment that the grievance was untimely.

Unlike the employer's refusal in *GAF Corp.*, supra, to arbitrate a narrow, specifically defined subject matter, the Respondent's refusal here is based on a sweeping procedural matter which cuts across all kinds of subjects that may be grieved. Here, the Respondent's

[1] All subsequent dates are in 1993, unless stated otherwise.

[2] It appears that the Union took the position that the subcontracting did not actually begin until September 8.

[3] Art. 14.6 provides that ''*individual* grievances'' which are not processed in accord with the time limits of the grievance procedure shall be deemed to have been resolved against the party failing to comply with the time limits. (Emphasis supplied.) Art. 14.6, however, expressly does not apply to ''Policy'' grievances, which are defined by the article as grievances filed by the Company or the Union ''of a general nature affecting the bargaining unit as a whole.'' The subcontracting grievance at issue here is clearly a ''Policy'' grievance, to which art. 14.6 is inapplicable.

[4] *GAF Corp.*, 265 NLRB 1361 (1982).

refusal to arbitrate the subcontracting grievance unlawfully ''unilaterally changed the terms of the collective-bargaining agreement by imposing a noncontractual condition that Respondent would arbitrate only those grievances that it decided should go to arbitration.'' *3 State Contractors*, 306 NLRB 711 at 715 (1992). Accordingly, I dissent from my colleagues' dismissal of the complaint.

Michael Fitzsimmons, Esq., for the General Counsel.
Richard D. Hayes, Esq. (Sullivan & Hayes), of Springfield, Massachusetts, for the Respondent.
William Rudis, of Stamford, Connecticut, for the Charging Party.

DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to a charge initially filed on January 24, 1994, a complaint was issued on March 10, 1994, which alleged that Velan Valve Corporation (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by failing to continue in effect all the terms and conditions of a collective-bargaining agreement with Local Lodge 2704, District Lodge 109, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union). Respondent's March 25, 1994 answer denied the commission of any unfair labor practice.

A telephonic prehearing conference took place on July 7, and a hearing was held before me in Boston, Massachusetts, on July 13, 1994. Simultaneous briefs were thereafter filed by General Counsel and Respondent under extended due date of August 29, 1994.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation which manufactures valves at a facility in Williston, Vermont. During the year ending December 31, 1993, Respondent, in the course of its operations at Williston, purchased and received goods valued in excess of $50,000 from points outside the State. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of the Act.

The Union is admitted to be, and I find is, a labor organization within the meaning of the Act.

II. THE ALLEGED VIOLATIONS

A. *Factual Background*[1]

Since 1981, an appropriate unit of Respondent's employees[2] has been represented by the Union. Respondent's recognition of the Union as the exclusive bargaining representative of these employees has been embodied in a series of collective-bargaining agreements, the most recent of which is effective from October 1, 1992, to September 30, 1995. Article 14 of that agreement, which sets forth a three-step grievance procedure, provides in section 14.5 that grievances ''not presented within five (5) working days after the circumstances giving rise to such grievances occurred or should have been known shall not be considered valid'' and in section 14.6 that grievances ''shall be deemed to have been resolved against the party failing to comply'' with the contractual time limits. Article 15 of the agreement, which governs arbitration, provides in pertinent part:

> 15.1 Any grievance not settled in accordance with Article 14 . . . may be submitted to arbitration at the option of either the Company or the Union.
>
> 15.2 In the event that a grieving party (Union or Company) submits a grievance or dispute to arbitration, an Arbitrator shall be selected according to and shall be governed by the following procedure:
>
> > If the grievance is not settled under Article 14 . . . it may be taken to arbitration within thirty (30) calendar days after receipt of the Union or the Company's Step III answer in writing.

The record reflects several disputes between Respondent and the Union concerning the interpretation of this language.

In 1985, Respondent refused to arbitrate a discharge grievance which had not been signed by the grievant during the time period required by the agreement. The Union filed an unfair labor practice charge which was dismissed by the Board's Regional Director because Respondent's refusal to arbitrate was ''based solely on its reasonable interpretation of the parties' collective-bargaining agreement and its resultant conclusion that it is under no obligation to arbitrate this grievance.''

Respondent refused to arbitrate a 1987 grievance arising from its refusal to grant leave to an employee to attend the funeral of his future wife's grandmother. Respondent's refusal to submit the matter to arbitration was based on the grievant's failure to cite a contract violation and the fact that the funeral was not held during working hours. The Union again filed an unfair labor practice charge which was dismissed by the Board's Regional Director because (1) Respondent's refusal was ''based solely on its reasonable interpretation of the parties' collective bargaining agreement and its resultant conclusion that it is under no obligation to arbitrate this grievance'' and (2) ''the refusal by an employer to arbitrate a single grievance, even if the refusal is a contract breach, is not itself an unfair labor practice.''

In 1991, Respondent characterized an untimely request to arbitrate a grievance as unreasonable. The record does not reveal whether any further action was taken by the Union on this occasion. In response to a May 1993[3] request from the Union to arbitrate grievance no. 93–2, Respondent stated its belief that the grievance was ''ineligible for arbitration'' under section 14.5 of the collective-bargaining agreement because, inter alia, both the grievance and the request for arbitration had been untimely filed.

[1] The facts appearing in this section are based on documentary exhibits of record and appear to be uncontested.

[2] The following employees are admitted to constitute an appropriate unit for the purpose of collective bargaining:

> All production and maintenance employees, including shipping and receiving employees, inspection, and raw material handlers employed at Respondent's Williston, Vermont facility, but EXCLUDING all office clerical employees, professional employees, guards and supervisors as defined in the Act.

[3] All dates hereinafter are 1993, unless otherwise indicated.

The events which gave rise to this proceeding also took place in 1993. By memorandum to the Union dated August 5, Respondent announced that it was going to subcontract janitorial services. The first subcontracted worker was assigned on August 20, and Respondent directly informed the Union on August 23 that subcontracted workers were on the job.[4] On September 8, the Union filed grievance no. 93–11 protesting the subcontract. At each step of the grievance procedure, Respondent denied the grievance on the merits and because it had been filed after the time limit specified in the collective-bargaining agreement. The Union requested arbitration on November 11. By memorandum dated November 18, Respondent refused to arbitrate on the ground that the grievance was untimely filed within the meaning of article 14.5 of the contract, was therefore resolved against the Union pursuant to article 14.6 and, accordingly, was not susceptible of arbitration under article 15. Respondent's memorandum further contended that the Union was acting in bad faith to circumvent contract language and stated that Respondent ''refuses to allow an outsider to review an issue which has been unequivocally resolved and settled by the language of the Labor Agreement.''

B. *Discussion*

The General Counsel contends that Respondent committed an unfair labor practice by refusing to continue in effect the arbitration provisions of the 1992 collective-bargaining agreement. Respondent, relying on *AT&T Technologies v. CWA*, 475 U.S. 643, 649 (1986); and *Xidex Corp*., 297 NLRB 110, 111 (1989), contends that grievance no. 93–11 was not arbitrable and that it was under no legal obligation to arbitrate until ordered to do so by the courts. While the cases cited by Respondent establish that the courts, rather than an arbitrator, must determine any threshold question of whether the parties' contract requires that the subject matter of their dispute be submitted to arbitration, a procedural issue arising out of that dispute, such as the timeliness of a grievance or a request for arbitration, may be determined by an arbitrator and the existence of such a procedural issue does not relieve a party of its duty to arbitrate. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 556–559 (1964); *3 State Contractors*, 306 NLRB 711, 714 (1992).[5] Accordingly, I find that Respondent had a legal duty to arbitrate grievance no. 93–11.

Respondent argues in the alternative that, while a refusal to arbitrate may violate the terms of its collective-bargaining agreement, such a refusal does not constitute an unfair labor practice. The General Counsel agrees that a single refusal to arbitrate a grievance does not violate the Act, but contends that Respondent's conduct amounts to a repudiation of the arbitration provisions of the collective-bargaining agreement. Specifically, the General Counsel argues that (1) Respondent's prior refusals to arbitrate establish a pattern of unlawful conduct and (2) Respondent's November 18 statement amounted to an unlawful policy. Assuming, arguendo, that Respondent refused to arbitrate in 1985, 1987, 1991, May 1993, and November 1993,[6] I find that the evidence in this case does not establish sufficient continuity among Respondent's acts over the 9-year period at issue to demonstrate a pattern of conduct which clearly and unequivocally repudiates the arbitration provisions of the collective-bargaining agreement. Four of Respondent's five refusals turn in major part on the Union's failure to meet the grievance processing deadlines imposed by the parties' collective-bargaining agreement. Even if a pattern of conduct were found to exist, that pattern might be found lawful given the ''narrow class'' of refusal shown in this case.[7] See *3 State Contractors*, 306 NLRB at 715; *GAF Corp*., 265 NLRB 1361, 1364–1365 (1982). Examination of Respondent's November 18 statement in context forces me to conclude that its refusal to allow outside review of an ''issue'' was intended to refer exclusively to the issue of the Union's failure to meet the collective-bargaining agreement's procedural time limits. I therefore find that Respondent's November 18 statement referred to a ''narrow class'' of refusals, rather than a broad policy of refusing to arbitrate any grievance which Respondent did not believe should go to arbitration. See *3 State Contractors*, supra; *GAF Corp*., supra. For the foregoing reasons, I find that Respondent was not shown to have repudiated the arbitration provisions of its collective-bargaining agreement with the Union.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. A preponderance of the evidence does not establish that Respondent violated the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

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[4] These facts are drawn from Respondent's dated October 15 and November 18 memoranda, which were not controverted by any evidence of record.

[5] The Supreme Court cited *John Wiley & Sons v. Livingston*, supra, in support of its holding in *AT&T Technologies v. CWA*, 475 U.S. at 649.

[6] Respondent contends that the evidence falls short of establishing an actual refusal to arbitrate in 1991 and May 1993.

[7] Given the holdings in text, I find it unnecessary to address Respondent's contentions that (1) its 1985 and 1987 refusals to arbitrate could not be unlawful conduct in view of the Board's dismissal of the related charges and (2) any of its refusals to arbitrate prior to the final one are barred by the 6-month time limitation of Sec. 10(b) of the Act.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.